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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2042

PETER FICORELLI, Petitioner

v

UNITED STATES OF AMERICA, Respondent

IN RE: GRAND JURY SUBPOENA TO
CUSTODIAN OF RECORDS,
MID-CITY REALTY COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	14
Appendix A	15
Appendix B	22

INDEX TO AUTHORITIES

Cases

Boyd v United States, 116 US 616 (1886)	4
Cauley v Cochran, 369 US 506	11
Couch v United States, 409 US 322 (1973)	4
Glasser v United States, 315 US 60	11
Grosso v United States, 390 US 62 (1968)	4
Johnson v Zerbst, 304 US 458	11
Marchetti v United States, 390 US 39 (1968)	4, 10
Murphy v Waterfront Commission, 378 US 52 (1964)	12
Shapiro v United States, 335 US 1 (1948)	2, 4, 5, 8, 9, 10, 11, 14
Wilson v United States, 221 US 361 (1911)	11

Other Authorities Page

MCLA §451.213(j)(5) 3, 5, 6, 7, 11, 13

28 USC §1254(1) 2

34 Minn L. Rev. 1 12

United States Constitution, Fifth Amendment 2, 3, 4, 5, 8, 9, 11, 13

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Peter Ficorelli by and through his attorneys N. C. Deday LaRene & Frederick R. Bellamy, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, affirming the propriety of the grand jury subpoena *duces tecum* served upon Leonard Ciaffone, President of Mid-City Realty Company, a sole proprietorship owned by Peter Ficorelli, requiring Ciaffone to produce the escrow records of said company.

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals is not yet reported, but is set forth herein as Appendix A.

JURISDICTION

The judgment of the Sixth Circuit of Appeals was filed May 23, 1974. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

Does the Fifth Amendment privilege against self-incrimination protect an individual real estate broker's escrow deposit, notwithstanding that they are required by state licensing law to be kept for potential examination by the state licensing body, and notwithstanding the "required records" doctrine announced by this court in *Shapiro* v *United States*, 335 US 1 (1948)?

STATEMENT OF THE CASE

On June 21, 1973, upon application of the United States, the United States District Court for the Eastern District of Michigan, Southern Division, issued a subpoena *duces tecum* to the custodian of the records of Petitioner. The subpoena required that Mr. Ficorelli, doing business as Mid-City Realty Company, an unincorporated real estate association, testify before the Grand Jury and bring all escrow deposit records for the period January 1, 1970

through December 31, 1972, for Mid-City Realty Company reflecting down payments made by prospective home buyers to the company for houses with FHA mortgages.

The records are required to be kept by MCLA 451.213 (j)(5), P.A. 1960, No. 112 §1, Effective August 17, which provides for the content of the records, the procedure for their inspection, and specific sanctions for failure to comply with the regulation. Petitioner has complied with the requirement that the records be kept.

On July 6, 1973, a hearing (Appendix B) was commenced before the Honorable Ralph M. Freeman, United States District Judge, in which the Government moved to compel the custodian of the escrow records of Mid-City Realty Company to turn them over to the Grand Jury, notwithstanding the subject of that subpoena's claim of privilege regarding the records. The Court granted that motion, on the basis of the "required records doctrine."

On July 9, 1973, the Court issued an Order in compliance with its ruling requiring the custodian of these escrow deposit records to turn them over to the Grand Jury. Subsequently, Mr. Ficorelli, President of Mid-City Realty Company, the owner of the records, directed the custodian of same not to comply with the Order of the Court.

The question of the propriety of the claim of privilege *vis-a-vis* the actual physical custody of the records is not before the Court (nor was it before the Court of Appeals). Immediately after the subpoena was originally served, Petitioner's attorney and counsel for the Government entered into an agreement under which Petitioner's attorney would assume physical custody of the records from Mid-City Real Estate, to assure their integrity while the Fifth Amendment question was litigated. Thus, this Court's

Opinion in *Couch* v *United States*, 409 US 322 (1973) is not decisionally relevant to the instant case. (See Appendix A.)

On January 16, 1973, a second hearing commenced before Judge Freeman at which time Mr. Ficorelli was adjudged in contempt of Court, with a penalty of One Hundred ($100.00) Dollars for each day that he refused to permit the custodian of the records to turn them over. At that time, an immediate stay of proceedings was granted so that an appeal could be perfected.

The Sixth Circuit Court of Appeals affirmed the decision of the District Court, again relying on the "required records doctrine." (See Appendix A.)

REASONS FOR GRANTING THE WRIT

In 1948 this Court, by a bare majority, held that those records required to be kept by a valid federal regulation acquire "public" aspects and hence are excepted from the Fifth Amendment guarantee against self-incrimination. *Shapiro* v *United States*, 335 US 1 (1948). Although this Court has narrowed and clarified the scope of application of the "required records" doctrine, *Grosso* v *United States*, 390 US 62 (1968); *Marchetti* v *United States*, 390 US 39 (1968), nonetheless many lower courts continue to misapply the rule, to the detriment of constitutionally guaranteed rights.

The basic premise is that production of private papers may not be compelled over assertions of Fifth Amendment rights, since any abridgement of those rights is constitutionally intolerable. *Boyd* v *United States*, 116 US 616 (1886). The problem then comes in defining at what point

the public aspects of documents, required by law to be kept, predominate over the essentially private nature of such records. Many business records, required by State law to be kept solely for the benefit of a regulatory agency retain their private character. Therefore, absent statutory authority to the contrary, their production ought not to be compellable by any others than those for whose benefit the documents were kept.

The ever-broadening interpretations of *Shapiro* are encroaching upon the very vital constitutional protection against self-incrimination. Therefore this Court should once again address itself to delimiting the "required records" doctrine, this time in the context of those records required by state statute to be kept only for purposes of licensing or regulation, which are not only essentially private in nature, but whose only public aspect is derived from the very statute which purportedly threatens their immunity.

The Government rather simplistically contends and the lower courts have herein held, that since the records subpoenaed by the Federal Grand Jury are subject to the public regulatory power of the State of Michigan they have become public records, and, under the rule established in *Shapiro*,—the "required records" exception,—as public records, they are not protected by the Fifth Amendment privilege against self-incrimination.

The information sought by the Grand Jury in its subpoena *duces tecum* is not public record so as to properly fall within the ambit of the "required records" exception to the Fifth Amendment. The Government's position in seeking discovery is manifestly erroneous, premised upon the assumption that the requirements of MCLA 451.213(j)(5), effectively transform a real estate broker's private escrow

deposit records into public records. The relevant portions of MCLA 451.213: Suspension or Revocation of License; Investigation, Grounds; Civil or Criminal Liability, provide in part:

> Sec. 13 The Commission may upon its own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any real estate broker or real estate salesman or any person who shall assume to act in either such capacity within this state and shall have the power to suspend or revoke any license issued under the provisions of this act at any time where the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of . . .
>
> (j) Failing to deposit in a custodial trust or escrow account all moneys belonging to others coming into the hands of the licensee in compliance with the following requirements: . . .
>
> (5) Every real estate broker shall keep records of all funds deposited therein, which records shall indicate clearly the date and from whom he received money, the dates deposited, the dates of withdrawals, and other pertinent information concerning the transaction, and shall show clearly for whose account the money is deposited and to whom the money belongs. All such records shall be subject to inspection by the commissioner or his deputies and by employees of the commission. Such separate custodial or trust fund account shall designate the real estate broker as trustee, and such account must provide for withdrawal of funds without previous notice.

> This act shall not be construed to relieve any person from civil liability or criminal prosecution under the general laws of this state.

Careful examination of MCLA 451.213(j)(5) reveals the error in the Government's contention. The title of the Public Act limits its applicability to suspension or revocation of the real estate license. The enforcement provision of the Act clearly sets forth the procedure whereby the Michigan Corporation and Securities Commission, upon its own motion or upon the verified complaint in writing of any person, is empowered to investigate and, if necessary, suspend or revoke the license of any real estate broker deemed guilty of performing any of the acts enumerated in MCLA 451.213. While the Act cannot be construed to relieve any person from criminal liability under the laws of the State of Michigan, it is clear that no statutory authorization exists for allowing these records to be used for any purpose other than licensing and regulation.

Access to a broker's escrow records is explicity limited to a specific group of state employees; only the Commission on its own initiative or on a verified written complaint may require production of the documents. Since "all such records shall be subject to inspection by the Commissioner or his deputies and by employees of the Commission," clearly the legislature did not intend that the documents be opened to public view. Records which must, according to state law, be kept for regulatory purposes, whose availability for such purpose is limited to so small a group cannot be considered public records, nor have they acquired any public aspects.

There are many legitimate reasons why a broker's records ought not to be made public. He may be acting for an undisclosed client. Records of a contract which never came to the "closing" might give a prospective purchaser

unfair information as to the price a seller was willing to accept. In fact a broker is in violation of his trust if he discloses any details of a sale to anyone not directly involved in the transaction. If he is handling the financing, he must even secure the permission of the vendee to make full disclosure to the prospective mortgagor.

The legislature took these ethical and practical considerations into account and specifically provided access to escrow records only to the regulatory body itself, not to the public. Therefore, since the public has no statutorily granted access to these records, the records acquire no public aspects by being required or regulated.

The statutory provisions of the Michigan Act may be distinguished from those with which the *Shapiro* doctrine dealt. The petitioner in *Shapiro* was a wholesaler of produce, obliged by a Federal Emergency Price Control Act regulation to keep and "preserve for examination" various records, "of the same kind as customarily kept." Pursuant to the express statutory provision, he was subsequently directed by an administrative subpoena to produce certain of these records before Office of Price Administration attorneys. In a prosecution for violation of the Price Control Act, Petitioner urged that the required production of his records violated his Fifth Amendment privilege. In a 5-4 opinion, this Court, relying upon cases holding that a custodian of public records may not assert the privilege as to those records, held that the records which were required to be kept by a valid regulation issued by the Emergency Price Control Act became public records, to which no Fifth Amendment privilege attaches.

Mr. Justice Frankfurter's strong dissent in *Shapiro* questioned and objected to the conclusion that the mere requirement that records be kept rendered the required records unprivileged. 335 US 1, 58 et seq. (1948).

An examination of the cases following the *Shapiro* doctrine reveals that they uniformly dealt with statutes which specifically provided for eventual public inspection of the documents. The fictional transformation of a private person into an ad hoc public official on the basis of a requirement that he keep records certainly never took place in the case at bar, since the Michigan statute fails to make the records sought by the Government accessible to the general public.

Thus it becomes imperative to follow Mr. Justice Frankfurter's reasoning in *Shapiro*, that the Fifth Amendment privilege should not be abrogated by a dangerously elastic and facile characterization of records as "public" and therefore unprivileged simply because they are required to be kept for inspection under some circumstances by some persons.

More importantly, Mr. Chief Justice Vinson, writing for the Court in *Shapiro*, noted that the application of the "required records exception" is constitutionally limited to the examination by the administrative agency delegated the power by statute to examine the records:

> It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and (then) may be used in prosecuting statutory violations committed by the record-keeper himself . . . the government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, *subject to inspection by the administrator*. (Emphasis added.) *Shapiro* v *United States*, 335 US 1, 27.

Therefore, it is abundantly clear that since the Federal Grand Jury is not the Commission of Real Estate, it may not on its own motion compel production and personal inspection of Petitioner's records under any legitimate application of the "required records" doctrine. The Michigan Act expressly limits the power of investigation and inspection of Petitioner's records to the State Commissioner of Real Estate.

The 6th Circuit's analysis world seem to be that merely because records are required to be kept by a law, which although it limits access, does not specifically and tautologically deny public availability, they obtain public aspects which prevent the custodian of those records from asserting his Fifth Amendment privilege against self-incrimination.

Appellant urges that an examination of *Marchetti* v *United States* 390 US 39 (1968) would indicate that this Court has, in effect, adopted Justice Frankfurter's more exacting analysis delineated in his dissent in *Shapiro* so far as "public aspects" are concerned:

> "The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress."
>
> *Marchetti, supra*, at 57. See Justice Frankfurter's dissent in *Shapiro, supra*. 385 US at 51 (1948).

The constitutional basis for the required records doctrine's expanding inroads into the Fifth Amendment's protection has been an ill-defined notion of waiver; a person who carries on activities subject to record-keeping requirements waives the privilege as to those records. *Wilson* v *United States*, 221 US 361. However, since the "waiver" is said to result from the statutory requirement, the rationale is generally no more than a statement that books required to be kept are not privileged because they are required to be kept. See Justice Frankfurther, dissenting in *Shapiro, supra,* at 51.

The privilege against self-incrimination is not waived by mere compliance with MCLA 451.213, by keeping those records required to be kept. In *Marchetti,* 390 US 39, Mr. Justice Harlan expressed the views of seven members of the Supreme Court:

> "The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situation in which it has been historically guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uniformed waivers of the privilege have been said to have occurred."

See *Carnley* v *Cochran*, 369 US 506, *cf* also, *Johnson* v *Zerbst*, 304 US 458, and *Glasser* v *United States*, 315 US 60.

To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding

them would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation". Morgan, *The Privilege Against Self Incrimination,* 34 Minn L Rev 1, 37.

Therefore, it is imperative that Petitioner's constitutional privilege against self-incrimination not be construed to have been meaingfully "waived" merely because Petitioner elected to keep the information required to be kept by the Michigan statute.

The impropriety of finding waiver from the keeping of the records involved in the instant case is underscored by the fact that to find such a waiver requires a finding of a waiver of federally guaranteed rights by virtue of adherence to a state scheme of regulation. Entering into a regulated profession under a State grant of authority, and adherence to the record keeping requirements of the regulatory scheme under which the authority to engage in that business is given, may constitute a waiver of one's rights of privacy in regard to those records, *vis-a-vis* the State sovereignty, within the ambit of the State regulatory scheme. Yet to hold that an individual's contract of adhesion with the State sovereignty, which allows him to do business under the State's grant of authority in exchange for his waiver of certain rights as against the State, is equivalent to, or may be construed as, a waiver of important Federally-guaranteed rights as against the Federal sovereignty is ingenuous in the extreme, defies ordinary common sense and is simply unsound as a matter of constitutional law.

A State may not compel testimony which may lead to a Federal prosecution, since the State is powerless to grant immunity from prosecution by the Federal government, *Murphy* v *Waterfront Commission,* 378 US 52 (1964).

Similarly, it does violence to fundamental principles of federalism as well as ordinary principles of common sense, to construe an individual's doing business under a State grant of authority, and concommitent keeping of records in response to the requirements of the State's grant, as a waiver of Federal constitutional rights as against the Federal sovereignty, which has no part in the implied agreement between the State and the individual to do business or to keep records.

It is appropriate to note that the basic constitutional question concerns the scope of the Fifth Amendment, not the validity of the Michigan Act. Petitioner emphasizes that he is not challenging the validity of the recordkeeping requirements of MCLA 451.213(j)(5). In construing the statute to bring Appellant's private documents within the required records exception to the Fifth Amendment, the Sixth Circuit Court treated the issue raised by Petitioner as though it were self-evident that when records are required to be kept for some needs of Government, or to be kept in a particular form, they are legally considered governmental records and may be demanded as instruments of self-incrimination.

As Frankfurter, J. stated:

> "Ready-made catch-phrases may conceal but do not solve serious constitutional problems. 'Too broadly generalized conceptions are a constant source of fallacy.' Holmes, J. in *Lorenzo* v *Wirth*, 170 Mass 596, 600, 49 NE 1010, 40 LRA 347. Here the fallacy can be traced to the rephrasing of our problem into terms 'to which as lawyers the judges have become accustomed.' *Ibid.*; Then, by treating the question as though it were the rephrased issue, the easy answer appears axiomatic and, because familiar, authoritative. Subtle question-begging is

> nevertheless question-begging. Thus: records required to be kept by law are public records; public records are non-privileged; required records are non-privileged."
>
> Frankfurter, J. dissenting in *Shapiro, supra,* at 51.

Petitioner urges that escrow deposit records of an unincorporated real estate association which are required to be kept by MCLA 451.213(j)(5), are private papers protected by the privilege against self-incrimination of the Fifth Amendment to the United States Constitution. Therefore, the subpoena issued by the Federal Grand Jury should be quashed.

CONCLUSION

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

N. C. Deday LaRene
Frederick R. Belamy

APPENDIX A

No. 73-1854

United States Court of Appeals
For The Sixth Circuit

In Re: Grand Jury Subpoena to Custodian of Records, Mid-City Realty Company.	Appeal from US District Court, Eastern District of Michigan.

Decided and Filed May 23, 1974.

Before Phillips, Chief Judge, Edwards, Circuit Judge, and O'Sullivan, Senior Circuit Judge.

O'Sullivan, Senior Circuit Judge. This case presents the question of whether a real estate broker can invoke the privilege against self incrimination in order to prevent disclosure of escrow deposit records which are required to be kept by state law. A grand jury subpoena *duces tecum* had been served upon Leonard Ciaffone, President of Mid-City Realty Company, a sole proprietorship owned by Peter Ficorelli, requiring Ciaffone to produce the escrow records of said company reflecting down payments made to such company by prospective buyers of homes, with mortgages thereon to be insured by the FHA. The records, so subpoenaed, are required to be kept under Michigan Law, Mich. Stat. Ann. §19.803 (Supp 1973) (Mich. Comp. Laws §451.213) which provides in pertinent part:

> "The commission may upon its own motion, and shall upon the verified complaint in writing of any person, investigate the actions of an applicant for a real estate broker or real estate salesman license or any real estate broker or real estate salesman or any person

who shall assume to act in either such capacity within this state and shall have the power to deny, suspend or revoke any license issued under the provisions of this act at any time where the applicant or licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

* * * * *

(j) Failing to deposit in a custodial trust or escrow account all moneys belonging to others coming into the hands of the licensee in compliance with the following requirements:

* * * * *

(5) Every real estate broker shall keep records of all funds deposited therein, which records shall indicate clearly the date and from whom he received money, the dates deposited, the dates of withdrawals, and other pertinent information concerning the transaction and shall show clearly for whose account the money is deposited and to whom the money belongs. All such records shall be subject to inspection by the commissioner or his deputies and by employees of the commission. Such separate custodial or trust fund account shall designate the real estate broker as trustee, and such account must provide for withdrawal of funds without previous notice.

* * * * *

This act shall not be construed to relieve any person from civil liability or criminal prosecution under the general laws of this state."

The said Ciaffone did not produce such records and thereafter an attorney for Mid-City Realty Company, N.C. Deday LaRene, advised the District Court that he would

take, and keep custody of such records until the Court determined the propriety of the requirement that such records be so produced. A grand jury subpoena for the production of such records was thereupon served upon the said attorney, and upon Ficorelli as owner of Mid-City Realty Company. The said attorney claimed justification for such refusal by averring:

> "They are not corporate records and therefore not subject to subpoena, and that the compelling of their production would violate my client's Fifth Amendment privilege against self-incrimination."

On July 16, 1973, Judge Freeman entered an order requiring Ficorelli to direct his attorney to deliver the said escrow records to the grand jury. Ficorelli advised the District Judge that he would refuse to obey such order. Thereupon, Ficorelli was held to be in contempt of the District Court and a fine of $100 for each day that Ficorelli would persist in such refusal was imposed. On the same day enforcement of the contempt order was stayed pending disposition of the appeal now before us.

Appellant's position is succinctly presented by the Statement of Issue set out in his address to us:

> "Can a Federal Grand Jury compel the production of non-corporate escrow deposit records, required by a state statute to be kept, notwithstanding the appellant's Fifth Amendment claim of privilege?"

We believe that the Supreme Court's decision in *Shapiro* v *United States*, 335 U.S. 1, 92 L Ed 1787 (1948), compels us to affirm the District Court. At issue is whether the "required records exception" to the Fifth Amendment privilege against self incrimination as announced in *Shapiro*

is applicable to appellant's escrow deposit records. That exception, as stated in *Shapiro,* is that:

> "The privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" 335 U.S. at 33.

In *Grosso* v *United States,* 390 U.S. 62 (1968), the Supreme Court found deprivation of Fifth Amendment rights where a gambler was convicted of failure to pay the occupational tax imposed on the business of placing wagers. It was held that to require payment of the tax was tantamount to an admission of guilt of violation of the anti-gambling laws. The Court distinguished *Shapiro* as follows:

> "[F]irst, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents." 390 U.S. at 67-68.

To the same effect is *Marchetti* v *United States,* 390 U.S. 39, 56-57 (1968).

In the matter before us, the first and second elements of the *Grosso* test are met. Although the last sentence of Section 19.803 of the Michigan Statute states that the law is not to be construed "to relieve any person from civil liability or criminal prosecution," the statute when read as a whole is regulatory, non-criminal, in nature. Its focus

is on investigating applicants, salesmen and real estate brokers on a variety of practices, and it provides a scheme whereby various records are required to be kept. Such records can become harmful—criminal in nature—only when the provisions of the statute are not complied with. There is also no doubt that the escrow deposit records are such as would be "customarily kept" by a real estate organization.

Appellant contends, however, that the third requirement —that the records must have assumed "public aspects"—is missing. He contends that the exclusive purpose of requiring the records is for the denial, suspension or revocation of real estate licenses. There is no specific statutory authorization for using the records for other purposes. We are unable, however, to accept such a restrictive view of the involved statute. While the section does not specifically state that other interested groups may have access to the records, it does not exclude others from obtaining such material. Furthermore, the fact that criminal prosecution is possible for those keeping the records supports the view that use of the records by the Commission is not exclusive. It is of no significance that the record keeping requirement is established by state law rather than federal law.

In *United States* v *Silverman*, 449 F2d 1341 (2d Cir 1971), *cert. denied*, 405 U.S. 918 (1972), the Second Circuit held that closing statements in contingent fee cases were subject to the required records exception. By a New York Court Rule, such closing statements were required to be filed, and the information therein could be divulged only upon written order of the Presiding Justice of the Appellate Division of the state court. In order to ascertain defendant's gross income, the Internal Revenue Service sought and was given the taxpayer's statements. The Court there said:

> "Records required to be kept pursuant to a reasonable regulatory scheme have 'public aspects' and may be examined for evidence of criminal conduct.
>
> * * * * *
>
> The documents involved here have no relevance to the revelation of criminal conduct. At the time they were filed they did not incriminate; they became harmful only after the filing of tax returns that failed to report certain income." 449 F2d at 1345-46.

We believe that there is sufficient public concern for the requirement of keeping records in the present case. As in *Silverman*, these records did not have to be open to the general public in order to meet the "public aspects" requirement.

In *Couch v United States*, 409 U.S. 322 (1973), the Supreme Court held that the Fifth Amendment did not prevent the Internal Revenue Service from obtaining business and tax records which the taxpayer had turned over to her accountant. It stated:

> "It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege; it adheres basically to the person, not to information that may incriminate him . . . It is extortion of information from the accused himself that offends our sense of justice." 409 U.S. at 328 (Emphasis in original.)

The Court concluded:

> "Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot

reasonably claim, either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality.

V.

"The criterion for Fifth Amendment immunity remains not the ownership of property but the '"physical or moral compulsion" exerted.' *Perlman,* 247 U.S., at 15. We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused." 409 U.S. at 335-36.

The required records exception as applied in this case is consistent with the Court's interpretation of the Fifth Amendment in *Couch.* Under the duty to disclose information pursuant to Section 19.803, there was no legitimate expectation of privacy, and therefore no privilege attached. We consider that our decision in *United States* v *Blank,* 459 F2d 383 (6th Cir), *cert. denied,* 409 U.S. 887 (1972), is consistent with the conclusion we reach.

The decision of the District Court is affirmed.

APPENDIX B

United States of America

United States District Court for the Eastern District of Michigan, Southern Division

In Re: Grand Jury Subpoena to Custodian of Records—Mid-City Realty Company	Misc. 73105

Proceedings had in the above-entitled matter before the Honorable Ralph M. Freeman, District Judge, at Detroit, Michigan, on Friday, July 6, 1973.

Appearances: Robert P. Hurlbert, Esq. Assistant United States Attorney, appearing on behalf of the United States of America; N. C. DeDay Larene, Esq., appearing on behalf of Mid-City Realty Company.

Detroit, Michigan
Friday, July 6, 1973
3:10 p.m.

The Clerk of the Court: Miscellaneous 73105, in re Grand Jury Subpoena to Custodian of Records, Mid-City Realty Company.

Are the parties ready, please?

Mr. Hurlburt: Government is ready.

Mr. LaRene: Defendant is ready.

The Court: Good afternoon, gentlemen.

Mr. Hurlburt: Thank you, your Honor, for taking the time to hear this matter.

The Court: All right, you may proceed.

Mr. Hurlburt: Your Honor, the Government seeks to compel the custodian of the escrow records of Mid-City Realty Company to turn them over to the Grand Jury and that, essentially, is the legal issue to be resolved this afternoon.

The Mid-City Realty Company is a real estate brokerage firm and they are licensed by the State of Michigan. It is an assumed name for one Peter Ficorelli and, under the statutes of the State of Michigan, they are required to keep certain escrow records. It is those escrow records we require.

The escrow records are at this point in time, as I understand it, in Mr. LaRene's office and they are in Mr. LaRene's office pursuant to an understanding reached in front of Judge Thornton on the 18th of June where Mr. LaRene represented to Judge Thornton that he would keep the records in his office until such time as this matter could be disposed of.

That being the case, then, your Honor, as to the factual framework for the Government's request, the Government contends, then, that because these are records that are required to be kept by state statute, and I have quoted the statute in my brief, it is Section 451.213—

The Court: Yes, I have read the statute.

Mr. Hurlbert: Right. Because the statute requires them to be kept, the Government believes the Grand Jury is entitled to inspect them.

The Government basically relies on the Shapiro case, your Honor, the 1947 Supreme Court decision—

The Court: I have also read that.

Mr. Hurlbert: —and the Second Circuit decision which, I think, is most in point, the Silverman decision. I don't think—

The Court: I haven't read Silverman. I notice you cited that in your brief.

Mr. Hurlbert: Yes, your Honor. Page 1345 is the relevant page. I have the Reporter here, if the Court would care to see it.

The Court: It is not—the citation is wrong there. That should be 449 F2d, shouldn't it?

Mr. Hurlbert: I'm sorry. That's correct. That was a typographical error; that's correct, it should be 449 F2d. I have it, if the Court would care to use the Reporter.

The Court: Oh, you have it, all right.

Mr. Hurlbert: Basically, your Honor, it's headnote 5 on Page 1345.

What was involved in the Silverman case was the Internal Revenue Service, in making an investigation, reviewed certain closing statements of an attorney which were required to be kept by New York law. The attorney contended that the Government had no right to review these records. The Second Circuit denied this contention, indicating that because they were required to be kept pursuant to a regulatory scheme and had public aspects, they could be examined for evidence of criminal conduct.

Those two cases principally, your Honor, are the basis of the Government's request for the records pursuant to its subpoena.

The Court: All right. You are Mr. LaRene?

Mr. LaRene: DeDay LaRene, your Honor.

The Court: What is your last name?

Mr. LaRene: LaRene, L-a-R-e-n-e.

The Court: All right.

Mr. LaRene: I am, in fact, the custodian at this point pursuant to the agreement which Mr. Hurlbert correctly described to the Court.

Our position in this regard is that the Government is misconstruing and misapplying the doctrine of Shapiro in a factual context, and in a factual setting, which really has no application.

In Shapiro, as in the case of all the cases cited by the Government, the question before the Court, before the Supreme Court, was the constitutional validity, vis-a-vis the Fifth Amendment, of a scheme which required records to be kept.

Now, in Shapiro, the statute provided that these records were to be kept for inspection by the administrator of the OPA or EPA Act.

The Court: That is right.

Mr. LaRene: The EPA administrator inspected the records pursuant to his statutory authority and also pursuant to his statutory authority then commenced criminal proceedings against Shapiro. So in that context, the Court was faced with the question of whether Congress could require the defendant, Shapiro, to open his business records up to the administrator of the EPA in the exercise of the administrator's duties and over-broad language to the contrary notwithstanding, I am going to address myself to that shortly. That was the only question before the Court in Shapiro.

The statute which Mr. Hurlbert cites to the Court, the Michigan statute here, requires records to be kept for the benefit and inspection of the Commissioner of Real Estate or licensing and Regulation. Were this a proceeding in which the records were sought to—excuse me, where the Commission were seeking to examine records, the precise question which was faced in Shapiro and decided in Shapiro would be before the Court. It is not, however, before the Court at this time and I would suggest that Shapiro does not control the instant situation.

We have in Michigan a state statute which defines a record-keeping duty and the exposure or the availability of records and documents for a limited purpose, a regulatory scheme. I would suggest that that statute cannot be used as a bootstrap, as a vehicle for the United States

Government to gain access to papers which would otherwise be covered by the constitutional privilege. One, because of the precise language of the statute and the limitations placed upon the use, availability and disclosure of such records by the statutes, and, two, because of the fact that it is a state statute and not a federal statute that we are here discussing.

The Court: Well, do you think that makes any difference?

Mr. LaRene: Yes, your Honor, I do.

The Court: Whether it is state or federal? Why? It is the right involved here. The right would be the same, wouldn't it, self-incrimination?

Mr. LaRene: The source of the right is different, your Honor.

My contract with the sovereign, the state sovereignty gives me a privilege against self-incrimination as against the State.

In the Federal Constitution, I am accorded a privilege against self-incrimination as against the Federal Government. Now, it may be that in some contexts my state privilege against self-incrimination will save me from exposing myself to federal prosecution, and vice-versa, but that is not the question before the Court, no more than a state—

The Court: Well, wouldn't you have a right to be protected against self-incrimination by reason of some state regulation or statute just the same as you would if it was a federal statute?

Mr. LaRene: Indeed, there is a Michigan State constitutional provision relating to the privilege against self-incrimination and I cannot—I would suggest that the validity of the state statute, which I am not questioning here, would depend upon sort of a contract between the individual and the State, that in order to receive the priv-

ilege of engaging in the business of real estate brokerage within the State, he will waive certain of his rights as against the State. That is the contract which is represented by this statute and by Mr. Ficorelli's doing business under the statute, but no more than the State could grant Mr. Ficorelli immunity from federal prosecution can the State abridge his federal right against self-incrimination, vis-a-vis the Federal Government.

In a Michigan Supreme Court case, People v Denuyl, the Michigan Supreme Court—the citation is 318 Michigan Reports 645—the Michigan Supreme Court specifically recognized that a state grant, a Michigan state grant of immunity would not offer protection from federal prosecution, and in Denuyl it was held that if disclosures made pursuant to state action would tend to lead to federal prosecution, then by the state statute—excuse me, by the State constitutional provision, those disclosures could not be compelled.

If we were before a State Court, arguing the validity of the Michigan state statute as here applied with the possible pendency and investigation of federal charges, I would argue that the state privilege against self-incrimination has not been waived to the extent that it would require my client to disclose documents which might subject him to federal prosecution. Since the State cannot protect him against federal prosecution, the State cannot expose him to federal prosecution by virtue of a statute, court order, or any other state action.

Beyond that, and independent of this notion of separate sovereignties, the Shapiro case, as I understand it and as it has been interpreted by the United States Supreme Court in Grosso v the United States, one of the trilogy of the Fifth Amendment cases, along with Marchetti and Haynes, I believe, Grosso was the wagering tax stamp and that's 390 U.S. 62, at Page 68, the Court, in addressing itself

to the doctrine of the required records doctrine as propounded in Shapiro, and I would quote:

> "The premises of a doctrine as it is described in Shaprio are evidently three: First, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept, and, third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents."

The phrase "public aspects" has never been defined by the Supreme Court. A definition which I would urge upon the Court is that contained in a comment in 82 Harvard Law Review 95, at Page 201, and I would quote again for the Court:

> "The suggested meaning of 'public aspects' is records which are usually known to the public in general rather than records which are essentially personal to the individual."

The Michigan state statute, I would submit to the Court, does not open Mr. Ficorelli's records up to the public in general. It opens those records to a limited class of persons, the Commissioner or his agents. We cannot, by contorting and by extending the language of Shapiro in any way change that limited aspect of the state statute upon which the Government bases its claim for these records.

Indeed, the language in Shapiro has been taken to suggest a broader meaning than I can imagine the Supreme Court, than I can believe the Supreme Court really intended. That has been noted by commentators. The case of United

States v Silverman, cited by the Government, is an example of that. First, I would distinguish Silverman because in Silverman the records which the Internal Revenue Service wound up looking at and which the Second Circuit held it had a right to look at had been turned over to the Internal Revenue Service by an Order of the Appellate Division of the New York Supreme Court, pursuant to the statute. There again, it was the validity of a statutory scheme and that statutory scheme for the disclosure of records which was at issue, not as here, a grand jury's inquiry into records which are not by any enactment, state or federal, open to it.

If the Court does not choose to read Silverman in that way, I can only suggest that the language to which the Court's attention was directed by Mr. Hurlbert is over broad, is dicta, and, finally, I can only say that if, indeed, Silverman stands for the broad proposition for which Mr. Hurlbert cites it, Silverman was wrong and was wrongly cited and wrongly interprets Shapiro and should not be followed by this Court.

Beyond that, your Honor—that is the sum and substance of the Defendant's response.

The Court: Anything further, Mr. Hurlbert?

Mr. Hurlbert: Your Honor, just two very brief points: One, we are not asking for all of Mr. Ficorelli's records. We are asking for escrow records.

The Court: For what?

Mr. Hurlbert: Escrow records. These are records of other people's money held by the broker and, as such, they have a certain public aspect and I think satisfy that requirement.

Secondly, this is not the type of situation depicted in Marchetti or Grosso where the record-keeping requirement automatically exposed an individual to self-incrimina-

tion. Keeping escrow records is basically an innocuous task and, indeed, whether or not they are self-incriminatory depends on whether or not there is any illegal transactions involved and, on their face, they are not self-incriminatory records and I don't believe the prohibitions of Grosso apply, therefore, to the escrow records being sought in this case.

Mr. LaRene: May I briefly respond, your Honor?

First, I was not suggesting to the Court that Marchetti or Grosso were controlling in this situation. I was illustrating, reading from Grosso, only to demonstrate the limited reading, narrow interpretation which the Supreme Court has, distinguished from which any inferior court has given to Shapiro.

Secondly, while it may be that these records will touch on the business of third parties not parties to this action, I don't think that Mr. Hurlbert could deny that Mr. Ficorelli, Mid-City Realty, my client, is the target of a grand jury criminal investigation and, in fact, it is those aspects of the records which apply to him and his business and the conduct of his business which Mr. Hurlbert is interested in and the Grand Jury is interested in.

The Court: This is a motion of the Government for an order compelling the custodian of the escrow records of Mid-City Realty Company to produce for the inspection of the Grand Jury of this District. The records in question are required to be kept by Section 19.803-J5 of the Michigan Statutes Annotated which, in relevant part, provides:

> "Every real estate broker shall keep records of all funds deposited therein, which records shall indicate clearly the date and from whom he received money, the dates deposited, the dates of withdrawals and other pertinent information concerning the transaction, and shall show clearly for whose account the money is deposited and to whom the money belongs. All such

> records shall be subject to inspection by the Commissioner or his deputies and by the employees of the Commission. Such separate custodial or trust fund accounts shall designate the real estate broker as trustee and such account must provide for withdrawal of funds without previous notice."

This same statute makes it an offense for an applicant for a real estate broker, or a real estate broker to fail to deposit in a custodial account or escrow account all monies belonging to others coming into the hands of the licensee in compliance with certain requirements, one of which is the section that I have just read.

The Government, in support of its request for an order of this Court, relies primarily on the case of Shapiro v United States, reported in 335 U.S., Page 1, and the case of United States v Silverman, a Second Circuit case reported at 449 F 2d, Page 1341, and decided October 26, 1971.

The relevant language of Shapiro, which was a case involving records required to be kept as a means of enforcing the Emergency Price Control Act, and whether or not there was immunity as to the records required be kept under that Act as immunity to the individuals, the Supreme Court in that case, at Pages 32 and 33, after setting forth the issue and recognizing the limits beyond which the Government cannot constitutionally exceed its powers in requiring the keeping of records which may be inspected by an administrative agency, and after pointing out that the Congress had constitutional authority to prescribe commodity prices as a war emergency measure, that the licensing and record-keeping requirements of the Price Control Act was a legitimate exercise of that power, stated at Page 33:

> "The privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of government regulation and the enforcement of restrictions validly established."

In Shapiro, the Court earlier in the Opinion referred to the principle laid down in the case of Wilson v United States, 221 U.S. 361, and Davis v United States, 328 U.S. 582.

Then in Silverman, the Court, at Page 1345 of the Opinion, stated:

> "Appellants' Fifth Amendment argument is equally without merit. Records required to be kept pursuant to reasonable regulatory scheme have public aspects and may be examined for evidence of criminal conduct."

The statutory or regulatory scheme here involved is not in question, as I understand it, and in any event it seems reasonable, has a rational basis, as I see it, and it seems to this Court that, on the basis of Shapiro and Silverman, the custodian of these records may not invoke his Fifth Amendment privilege and therefore the motion of the Government should be granted and an order may be submitted.

Mr. Hurlbert: Thank you, your Honor.

The Court: Court will be in recess.

(Whereupon the hearing in the above-entitled matter was concluded.)

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2042

PETER FICORELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a subpoena demanding the production of certain records, required by state law to be kept, violated the privilege against self-incrimination.

On June 21, 1973, the United States District Court for the Eastern District of Michigan issued a grand jury subpoena *duces tecum* to Leonard Ciaffone, president of Mid-City Realty Company, a sole proprietorship owned by petitioner, Peter Ficorelli. The subpoena ordered the production of escrow records of the company; the records reflected down payments made by prospective purchasers of homes the mortgages on which were to be insured by the Federal Housing Authority (FHA). State law required these records to be maintained.[1] Ciaffone did not produce the records, and N.C. Deday LaRene, the attorney for

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[1]That law, Mich. Stat. Ann. § 19.803 (Supp. 1973), is part of a general scheme of regulation of the Michigan real estate industry. See, *e.g.*, Mich. Stat. Ann. §§19.791-19.809.

the company, indicated that he would assume custody of the records until the issue concerning the propriety of the subpoena was resolved. Subsequently, a subpoena for the records was served upon both the attorney and petitioner. At a hearing on July 6, 1973, petitioner argued that compelling production of the escrow records would violate his Fifth Amendment privilege against self-incrimination. This position was rejected by the district court, which issued an order directing compliance with the subpoena. Petitioner did not comply, and on July 16, 1973, he was adjudged in civil contempt and directed to pay one hundred dollars for each day that he persisted in his refusal. This order was stayed pending decision on appeal. The court of appeals affirmed (Pet. App. A).

1. Petitioner argues that compelling production of the requested escrow deposit records would violate his Fifth Amendment privilege against self-incrimination. This contention is at variance with this Court's "required records" decisions. "[T]he privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.' " *Shapiro* v. *United States*, 335 U.S. 1, 33,[2] (citing *Davis* v. *United States*, 328 U.S. 582, 589-590).

Shapiro created a rule, elaborated in subsequent cases (see, *e.g.*, *Marchetti* v. *United States*, 390 U.S. 39, 56-57), under which the government may require "the keeping

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[2]The defendant in *Shapiro*, a produce wholesaler, had been required under war-time price control laws to maintain records of all sales and to provide these records on request to the Office of Price Administration. Accordingly, while claiming a privilege against self-incrimination, he obeyed a subpoena from the Price Administrator requesting such records. A prosecution for violation of price control laws was subsequently instituted and this Court rejected the argument that the record maintenance requirements of the price control laws violated the Fifth Amendment.

of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself" (335 U.S. at 32). Records may be so used if they meet three criteria: First, the records required must be of a type customarily maintained; secondly, the records must constitute material having a "public aspect," that is, there must be "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned * * *" (*ibid.*); finally, the requirements must be imposed pursuant to a generally regulatory, as opposed to criminal investigatory, scheme of legislation.

Petitioner's records satisfied these criteria.

(a) Escrow deposit records of home purchasers are ordinarily maintained by real estate organizations.

(b) Real estate transactions are an activity properly subject to governmental regulation in order to ensure the financial safety of those who purchase or sell real estate, and thus the records required here have a "public aspect."

(c) Although criminal penalties for failure to maintain the records are provided, the thrust of the legislation, as the court below observed, "is regulatory, non-criminal, in nature" (Pet. App. 18).

Petitioner argues that his escrow records, although required to be maintained, nonetheless do not have a public aspect because the public in general does not have access to the records and because such records may be used only for the purpose of licensing and regulation. However, it is a misreading of *Shapiro* to interpret "public aspect" as meaning that the records involved must be open to the public in general; "public aspect" denotes only that the

activity is one reasonably subject to governmental regulation. There is no basis for petitioner's assertion (Pet. 9) without citation that cases following *Shapiro* have "provided for eventual public inspection of the documents." Nothing in *Shapiro* indicated that the records subject to inspection by the Price Administrator were accessible to the public. Similarly, every individual is required to file an income tax return (see *United States* v. *Sullivan*, 274 U.S. 259), but such a record can hardly be deemed accessible to the public.

2. Contrary to petitioner's suggestion, *Marchetti* v. *United States, supra*,[3] did not constrict the "required record exception" test articulated by *Shapiro*. In *Marchetti* the Court held that a defendant charged with failing to comply with certain federal gambling laws, which required him to provide records of his gambling activities in order that special taxes might be assessed, might properly assert the privilege against self-incrimination as a justification for his non-compliance. The Court distinguished *Shapiro*, noting that the gambling records required were not of a type ordinarily maintained and that the legislation, rather than constituting a general regulatory scheme, was directed at a " 'selective group inherently suspect of criminal activities' " (390 U.S. at 57, citing *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79) and was primarily intended to aid criminal prosecution of such activities.

3. Nor is there merit to petitioner's attempt to restrict *Shapiro* to circumstances in which the disclosure of incriminating records is initially mandated by the particular agency exercising regulatory control over the matters

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[3]See also *Grosso* v. *United States*, 390 U.S. 62; *Haynes* v. *United States*, 390 U.S. 85.

reflected by the records. Records required to be maintained by one governing entity have frequently been obtained by the prosecutorial branch of another sovereignty. See *United States* v. *Silverman*, 449 F. 2d 1341 (C.A. 2); *Application of Nadelson*, 353 F. Supp. 971 (S.D. N.Y.).[4] Petitioner's contention that he cannot be deemed to have "waived" his privacy rights to the federal government, but only to the state government (Pet. 12), does not assist him. The required records exception of *Shapiro* is not based upon a fictitious waiver of privacy, but upon the theory that particular areas of enterprise are properly subject to governmental regulation, and that required records of these enterprises are not private matters to which the Fifth Amendment applies. Given the legitimate presence of a program of governmental regulation, whether state or federal, records maintained pursuant to such a program never acquire a private character and thus cannot be withheld on Fifth Amendment grounds.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

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[4]In *Silverman*, an income tax evasion prosecution, the prosecution established the defendant's gross income by using closing statements filed with the Appellate Division of the New York Supreme Court. These statements showed the amount of compensation received by an attorney in contingent fee cases and were required to be filed under New York State law; they were subject to disclosure only upon approval by the Presiding Justice of the Appellate Division. In *Nadelson*, the court refused to quash a subpoena requiring the subject's records relating to his process serving business, which were maintained as required by the New York City Department of Consumer Affairs.